Dated: December 09, 1999

CASE NO.: 1999-CAA-26

IN THE MATTER OF:

**John P. Carroll**
Complainant

v.

**UNITIL/Fitchburg Gas & Electric Co.**
Respondent

For the Complainant:
Robert C. Seldon, Esq.
Gregory J. Angelini, Esq.

For the Respondent:
Edward M. Kaplan, Esq.

Before:
**DAVID W. DI NARDI**
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION

This proceeding arises under the Clean Air Act, 42 U.S.C. § 7622; the Solid Waste Disposal Act, 42 U.S.C. § 6971; the Water Pollution Control Act, 33 U.S.C. § 1367; the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610; and the Toxic Substances Control Act, 15 U.S.C. § 2622.

### Procedural History

The Complainant, John Carroll, filed a whistleblower complaint against Unitil/Fitchburg Gas & Electric ("Respondent") pursuant to the above-mentioned statutes with the Boston office of the Occupational Safety & Health Administration by letter dated July 20, 1999 and filed on July 26, 1999.

The complaint alleged that Mr. Carroll was harassed on the job (paragraph 10), his department was reorganized (paragraph 11), a hostile work environment was created (paragraph 12), his employment was terminated (paragraph 13), the Respondents attempted to coerce Mr. Carroll to not reveal various violations of federal, state and local law (paragraph 14) and his position was abolished in retaliation for making protected disclosures (paragraph 22).

The complaint was denied by letter dated August 26, 1999. OSHA determined that all the allegations were untimely filed. Complainant timely filed a request for a hearing with Chief Judge John Vittone by letter dated August 30, 1999 and filed via facsimile the same day. The case was scheduled for hearing on November 29, 1999 and subsequently rescheduled to January 18, 2000 following an agreed upon Motion to Postpone Hearing.

By Motion dated October 8, 1999 and filed October 12, 1999, the Respondents seek summary dismissal of the case averring that the claim was not timely filed. This Court issued an Order October 13, 1999 giving the Complainant fourteen (14) days in which to file a response. On October 27, 1999, Complainant sought a two day extension in which to file a reply which was granted telephonically. Claimant filed his brief in opposition to summary dismissal on October 29, 1999. By Motion dated November 4, 1999 and filed via facsimile the same day, Respondents sought leave to file a rebuttal brief. This request was granted on November 8, 1999 and Respondents were given until November 16, 1999 in which to file their rebuttal brief. The rebuttal was timely filed via facsimile on November 16, 1999. Later that evening, Complainant sought leave to file a Sur-Reply brief. This request was granted on November 17, 1999 and Complainant filed same via facsimile on November 18, 1999. Without seeking the leave of this Court, Complainant filed a letter on November 29, 1999 enclosing three pages of Complainant's unemployment claim file. The following day, Complainant filed a copy of the Memorandum of Agreement entered into by the parties at a mediation session. On the same day, Respondent filed a response to the Complainant's filing of the pages from the unemployment file.

**Summary of the Evidence**

The documents submitted in support of and in opposition to the Motion for Summary Judgement support the following facts viewed in the light most favorable to the Complainant as the non-moving party:

1. The Complainant, John Carroll, was hired as Manager of Energy Operations by Unitil/Fitchburg Gas & Electric on October 11, 1994.

2. Mr. Carroll began making a series of protected disclosures no later than December of 1996, including, but not limited to:

- Unitil's alleged illegal scheme to evade responsibility for abatement of an asbestos contaminated electric generating facility;

- Unitil's alleged continued dominion and control over the foregoing asbestos contaminated facility;

- Unitil's alleged illegal installation of a large PCB-contaminated transformer within 30 feet of a mutilfamily apartment building;
- Unitil's alleged dumping of cyanide-contaminated waste that was 400 times the permissible EPA exposure level into a site immediately next to a navigable river.

3. As a result of these protected disclosures, senior management allegedly began to harass and retaliate against Mr. Carroll on a continuous basis beginning no later than January of 1997.

4. Respondent announced a proposed reorganization on March 26, 1998 which resulted in the elimination of the Complainant's position of Manager of Energy Operations.

5. The Complainant met with Mitchell Bodnarchuk, Vice-President and General Manager of Unitil, on the same day. Complainant alleges that Mr. Bodnarchuk assured him in that meeting that he was a valued employee and that he would be reassigned to and retained in a position at the same level and salary.

6. Complainant again met with Mr. Bodnarchuk on April 9, 1998 at which time he was informed of the availability of a position entitled Operations Support Manager. Mr. Carroll indicated that he was not interested in this position.

7. Mr. Carroll went on paid temporary disability on April 10, 1998. He has not worked since that date.

8. Mr. Bodnarchuck called Mr. Carroll at home on April 17, 1998 and inquired about his interest in other positions at Unitil. Mr. Carroll asked that the discussion be postponed as he had just gone out on disability. Mr. Bodnarchuk sent a letter dated that same day which Mr. Carroll alleges contains an inaccurate account of their meeting of April 9, 1998.

9. Respondent's Director of Human Resources, George E. Long, Jr., sent Mr. Carroll a letter dated June 19, 1998. The letter mainly concerns the return of a company vehicle which was still in the possession of Mr. Carroll. However, it did state unequivocally "As you are aware, the position of Manager of Energy Operations has been eliminated under the reorganization of the Company's operations which has been ongoing and is nearly complete." (Respondent's Motion for Summary Decision, Exhibit D)

10. Mr. Carroll responded to the above missive by letter dated June 23, 1998. Again, the majority of the letter concerns the issue of the company car in Mr. Carroll's possession. However, Mr. Carroll did write that, "In fact, your letter dated June 19, 1998, is the first time the company has informed me that my position has been eliminated." Mr. Carroll also averred in that letter that "On April 14, 1998, the company sent me a letter stating, 'this company guarantees your position with the company and the continuation of your benefits for up to 12 weeks per year for personal disability.'" (Respondent's Motion for Summary Decision, Exhibit F)

11. Mr. Long wrote a second letter to the Complainant dated July 9, 1998. After summarizing his version of events to date, Mr. Long wrote that Mr. Carroll's current employment status, among other things, was that his position of Manager of Energy Operations at Fitchburg had been eliminated, his short term disability would expire on October 14, 1998 and that, as of that date, his employment would be terminated due to the elimination of his position. Mr. Long wrote that this will occur unless Mr. Carroll bid on and accepted another position before that date. (Respondent's Motion for Summary Decision, Exhibit G)

12. In response to the above letter, Mr. Carroll hired an attorney, Judith A. Miller. Attorney Miller responded to Mr. Long's letter on July 31, 1998. Attorney Miller wrote that, "Mr. Long's letter of July 9th was the first time that the Company informed Mr. Carroll that his position was, in fact, eliminated." Attorney Miller also noted that prior to receipt of that letter, Mr. Bodnarchuk had assured Mr. Carroll that his job was not in jeopardy. (Respondent's Motion for Summary Decision, Exhibit I)

13. Former Counsel for Respondents, Glenn E. Dawson, wrote to Attorney Miller on September 1, 1998 following a phone conversation between the two on August 24, 1998. Attorney Dawson requested a meeting with the concerned parties to discuss, among other things, Mr. Carroll's "future employment status at the Company." (Complainant's Opposition to Respondent's Motion for Summary Decision, Attachment A)

14. Mr. Long wrote to the Complainant again on October 5, 1998. That letter again explained that, "your position of Manager of Energy Operations has been eliminated with the reorganization of Fitchburg Gas and Electric Light Company. Your Sick Pay benefits will be ending on October 14, 1998. Your employment with the Company will therefore be terminated effective October 14, 1998, and you will be eligible for Severance Pay benefits if you elect to execute the enclosed Agreement and General Release." (Respondent's Motion for Summary Decision, Exhibit J)

15. Complainant alleges that the release referred to in the above letter "also revealed for the first time that Mr. Carroll's receipt of a severance package would be conditioned on his execution of a general release containing a gag provision that would have prevented Mr. Carroll from voluntarily approaching Unitil's regulatory agencies and disclosing its illegal activities." (Complainant's Opposition to Respondent's Motion for Summary Decision, page 9) The pertinent section of the alleged "gag" provision reads as follows:

> EMPLOYEE shall keep entirely secret and confidential, and shall not disclose to any person or entity in any fashion or for any purpose, (other than to EMPLOYER or persons designated by EMPLOYER), any information or document relating to EMPLOYER and obtained during employment that is not available to the general public, including, without limitation, any information, general or specific, relating to EMPLOYER's business, marketing, sales, operations, customers, strategies, plans, or business practices, **except as required by governmental or regulatory agencies** (emphasis added). (Respondent's Motion for Summary Decision, Exhibit J)

16. Mr. Long wrote to Mr. Carroll again on October 19, 1998. Mr. Long indicates that, based on a recent conversation between the parties' attorneys, the Company was changing Mr. Carroll's employment status as previously described in the letter dated October 5, 1998. Specifically, Mr. Long wrote that the Complainant's "employment with the Company will not be terminated effective October 14, 1998. However, since your Sick Pay benefits have been exhausted as of that date, you will be in an unpaid status." Mr. Long also indicated that the agreement not to terminate the Complainant's employment at that time was based upon his attorney's request that she be allowed to present the specifics of his claim. Mr. Long also wrote that once the written specification of the claim was received there would be further discussions between the pertinent parties "with respect to it and with respect to your future employment status." (Complainant's Opposition to Respondent's Motion for Summary Decision, Attachment B)

17. Complainant's new counsel, Attorney Sharen Litwin, wrote a demand letter to Respondents on November 3, 1998. In a section of the letter detailing the factual allegations of the claim, Attorney Litwin wrote that Mr. Carroll held the position of Manager of Energy Operations "until it was eliminated in late March or April, 1998." The letter also alleged: wrongful discharge in violation of public policy, tortious interference with contractual and/or advantageous business relations and intentional infliction of emotional distress. (Respondent's Motion for Summary Decision, Exhibit L)

18. The parties engaged in settlement discussions over the next several months and entered into mediation on June 30, 1999. At the conclusion of the mediation, Counsel for Complainant conveyed a settlement proposal to Respondents. This proposal was rejected on July 4, 1999. (Complainant's Opposition to Motion for Summary Decision)

19. The following day, July 5, 1999, Complainant alleges that Respondents threatened to sue him if he did not return certain documents which the Respondents averred contained privileged information. This threat to sue was re-iterated in a letter dated July 8, 1999 from Attorney Glenn Dawson, representing Respondents, to Attorney Robert Seldon, now representing the Complainant. (Complainant's Opposition to Motion for Summary Decision, Attachment E)

20. Attorney Seldon then wrote a letter delivered via facsimile to Attorney Dawson dated July 15, 1999. The letter stated that the Respondent's failure to respond to the proposal made by Complainant, "has left us with no choice except to demand that Unitil unconditionally and immediately reinstate John." The letter also enclosed a copy of the complaint which was subsequently filed with OSHA. (Respondent's Motion for Summary Decision, Exhibit N)

21. Mr. Long then wrote a letter to Mr. Carroll dated July 16, 1999 in which he wrote that since the above letter dated July 15, 1999 indicated that settlement discussions did not resolve the disagreement, "this will serve to notify you that your employment with the Company is being terminated in all respects as of the date of this letter." The letter also stated that, "because your

termination stemmed from the Company's reorganization that eliminated your position, you are eligible for Severance Pay benefits as communicated to you in my October 5, 1998 letter, provided that you are willing to execute an appropriate General Release." (Respondent's Motion for Summary Decision, Exhibit O)

22. Mr. Carroll then filed the Complaint which is the basis for this action with OSHA on July 26, 1999. (Respondent's Motion for Summary Decision, Exhibit P)

## DISCUSSION

The standard for granting summary decision is set forth at 29 C.F.R. §§ 18.40(d). This section, which is derived from Fed. R. Civ. P. 56, permits an Administrative Law Judge to recommend summary decision for either party where "there is no genuine issue as to any material fact." **29 C.F.R. §§ 18.40(d)**. The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. **Gillilian v. Tennessee Valley Authority**, 91-ERA-31 (Sec'y Aug. 28, 1995) (citing **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247 (1986); **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986)). The determination of whether a genuine issue of material fact exists must be made viewing all the evidence and factual inferences in the light most favorable to the non-movant. **Id.** (citing **OFCCP v. CSX Transp., Inc.**, 88-OFC-24 (Asst. Sec'y Oct. 13, 1994)).

Respondent contends that summary decision is warranted as Mr. Carroll failed to file his complaint within thirty days of the alleged violations.[1] It is Respondent's position that Mr. Carroll received final and unequivocal notice that his position had been eliminated in the letter dated June 19, 1998 from Mr. Long. This fact is evidenced, Respondent argues, by Mr. Carroll's letter dated June 23, 1998 in which he stated that the above letter "was the first time the company has informed me that my position has been eliminated." Therefore, even if the June 23, 1998 letter is used to ascertain the date when Carroll first knew of the alleged discriminatory action, the complaint should have been filed no later than July 23, 1998 in order to comport with the applicable statute of limitations. As the complaint was not filed until July 26, 1999, it is untimely.

Respondent relies on the Fourth Circuit's decision in **English v. Whitfield**, 858 F. 2d 957 (4th Cir. 1988).[2] Vera English brought a claim against her employer under the Energy Reorganization

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[1] All of the statutes pursuant to which Mr. Carroll filed his complaint contain a limitation period of thirty days. Clean Air Act, 42 U.S.C. § 7622, (b)(1); Solid Waste Disposal Act, 42 U.S.C. § 6971(b); Water Pollution Control Act, 33 U.S.C. § 1367(b); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610(b); Toxic Substances Control Act, 15 U.S.C. § 7622(b).

[2] Respondent also puts forth arguments as to why the doctrines of equitable tolling and equitable estoppel are not available in this case. However, as the Complainant is not relying on

Act alleging unlawful discrimination as a result of safety complaints made to the Nuclear Regulatory Commission. In that case, English was informed by the company in a letter dated May 15, 1984 that, among other things, the temporary assignment she was given was reduced to 90 days, during which time she could attempt to secure another position with the company. If she did not secure a permanent position she would be laid off. English did not secure a permanent position and her last day of work was July 27, 1984. She then filed a complaint under the ERA on August 24, 1984. Her complaint was eventually dismissed as untimely. Relying on the Supreme Court's decision in **Delaware State College v. Ricks**, that the filing period begins running on the date the employee receives definite notice of the challenged decision and not on the date when the effects of that decision are ultimately felt, the Fourth Circuit upheld the dismissal of the complaint. **Delaware State College v. Ricks**, 449 U.S. 250, 101 S. Ct. 498 (1980). The Fourth Circuit held that, "the proper focus is on the time of the discriminatory act, not the point at which consequences of the act become painful." **English** at 961 (quoting **Chardon v. Fernandez**, 454 U.S. 6, 8, 102 S. Ct. 28, 29 (1981). The Fourth Circuit specifically rejected the argument that the May 15, 1984 letter was equivocal because the termination of her employment depended upon whether or not she secured another permanent position. The Fourth Circuit wrote the, "notice of the challenged employment decision itself was in form and final and unequivocal...The only uncertainty in the notice related to a possibility of avoidance of the consequences of the decision by means unrelated to its revocation or reexamination by the employer." **English** at 962. Therefore, it is clear that the Ricks-Chardon rule begins to run when the employee receives final and unequivocal notice of the challenged employment decision and not when employment is actually terminated. **English, supra**; **Janikowski v. Bendix Corp.**, 823 F. 2d 945 (6th Cir. 1987); **Martin v. Southwestern Virginia Gas Co.**, 135 F. 3d 307 (4th Cir. 1998).

Complainant responds with a two pronged argument: the Respondent never gave Mr. Carroll final and unequivocal notice until he was actually terminated on July 16, 1999 and the Respondent engaged in a continuous campaign to gag Mr. Carroll from revealing alleged illegal activities culminating with his termination on July 16, 1999. Expanding on the former contention, Complainant argues that this case does not hinge simply on the elimination of Mr. Carroll's position; that Mr. Bodnarchuk assured Mr. Carroll of an equivalent position with the company if the reorganization adversely effected his then current position; the notice of termination was conditioned upon Mr. Carroll not finding another position with the Company; the notice of termination was withdrawn on two occasions and a salary increase was awarded on another occasion.[3] Expanding on the latter

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either doctrine, the applicability of same will not be addressed.

[3] In the filings submitted subsequent to the Sur-Reply brief, Complainant asserts that Respondent contesting Mr. Carroll's entitlement to unemployment benefits is another violation in retaliation for protected activities. Complainant's argument hinges on the fact that the document submitted by Respondent to contest the unemployment benefits states that Mr. Carroll did not consider "other open positions." Complainant writes that this statement is in direct contradiction with a statement in the Motion for Summary Decision that Mr. Carroll was only considered for one position. This argument is without merit. Mr. Carroll was clearly and expressly informed that

contention, Complainant argues that the Respondent attempted to gag him on three occasions regarding alleged illegal activities by the Company. These attempts were: the letter dated October 5, 1998 to Mr. Carroll from Mr. Long which conditioned receipt of a severance package on the execution of a general release, the letter dated July 8, 1999 from Respondent's counsel demanding return of documents it considered covered by the attorney/client privilege and the termination letter dated July 16, 1999 which again conditioned receipt of a severance package on the execution of a general release.

Complainant derides reliance on the "one decade old case" of **English v. Whitfield** and urges reliance on three more recent cases. **Connecticut Light & Power v. Secretary of Labor**, 85 F. 3d 89 (2nd Cir. 1996); **Whitaker v. CTI-Alaska, Inc.**, ARB Case No. 98-036 (May 28, 1999); **Ross v. Florida Power & Light Co.**, ARB Case No. 98-044 (March 31, 1999). **Connecticut Light & Power** is cited in support of Complainant's position that the Respondent attempted to gag Mr. Carroll. In that case, the employer offered a settlement agreement which included provisions that prohibited the employee from appearing or encouraging others from appearing as a witness or party in any judicial or administrative proceeding against employee, required the employee to resist compulsory process and curtailed the substance and manner in which the employee could communicate with the Nuclear Regulatory Commission. **Connecticut Light & Power** at 94. The Second Circuit held that the above provisions in the settlement agreement represented a continuing violation and since the settlement talks were broken off within thirty days of the complaint being filed the claim was timely made.

In **Ross**, the employee was given a memorandum on November 3, 1995 in which he was informed that he must find another position with the company within 45 days or clear his access requirement with the medical officer. On December 29, 1995, the employee received a letter terminating his employment as he had not obtained another position and had not received clearance from the medical officer. The employee then filed a claim within the required time limit if the December 29th letter was considered the operative notice, but not if the November 3rd letter was operative. The Administrative Review Board held the December 29th letter operative and found that the claim was timely filed. It distinguished **English**, because in that case the employee was permanently barred from a facility while in the instant case the employee was merely suspended. T he ARB concluded, "Until Ross was given the December 29, 1995 notice, it was reasonable for Ross to think that it was still possible for him to regain his access to the secured area, and thus his position." **Id** at 5. Therefore, the November 3rd letter did not constitute final and unequivocal notice.

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he could apply for any open positions. Complainant also argues that a statement written by an employee of the Division of Employment and Training which states that Complainant was notified that his position was eliminated on October 5, 1998 contradicts the notion that he received final and unequivocal notice in June. This statement is irrelevant. The letter of June 19, 1998 clearly and unequivocally stated that Mr. Carroll's position had been eliminated. The letter of October 5, 1998 indicated that his employment would be terminated on October 14, 1998. These facts are clear from the documentary evidence and are not impugned by the misstatement contained in the unemployment files.

In **Whitaker**, the complainant became aware that his position of General Manager was offered to another individual on January 22, 1997. However, he did not file a complaint until March 7, 1997, which was within thirty days of his last day of employment, February 5, 1997, but not within thirty days of January 22, 1997. In overturning the Administrative Law Judge's summary decision in favor of employer, the ARB held that,

> Viewing the evidence in the light most favorable to Whitaker, the party opposing summary judgement, and in light of Alyeska's failure to present any plausible rebuttal evidence, we conclude that Whitaker's allegations raised triable issues of fact under two valid theories – reasonable reliance on a promise to find a comparable alternative, and estoppel. Whitaker alleges that he was repeatedly assured by Alyeska that he would be placed with CTI, and that he had nothing to fear in terms of supervisory or financial loss; he had been called for an interview with CTI; the interview with CTI had focused entirely upon supervisory and managerial issues; both CTI officials who interviewed Whitaker (including Karnowski) told him that the interview had gone extremely well; Whitaker was never told that the two positions Karnowski offered him on January 20, 1997, were final offers. **Whitaker** at 7.

This Administrative Law Judge herein embarks upon the mission of striking an appropriate balance between "fidelity to statutory directive that complaints be pursued and investigated in a timely manner on the one hand and fairness to whistleblowing complainants on the other." **Hill and Ottney v. TVA**, 87-ERA-23/24, at 3 (Sec'y April 21, 1994), **aff'd**, 65 F.3d 1331 (6th Cir. 1995). Complainant puts forth a very plausible argument the final and unequivocal notice was not given to Mr. Carroll until the termination letter dated July 16, 1999. However, based on my interpretation of the relevant case law, I find and conclude that Mr. Carroll did not file his complaint in a timely manner.

As was mentioned above, Complainant put forth a two pronged argument as to why the claim was filed in a timely manner. First, that final and unequivocal notice was not given until the termination letter dated July 16, 1999. Secondly, the Respondent engaged in a continuing violation by attempting to gag Mr. Carroll until he was finally terminated on July 16, 1999. I will address each argument in turn explaining the rationale for my decision in the process.

Complainant argues that final and unequivocal notice was not given because, in part, Mr. Bodnarchuk, in conversations with Mr. Carroll, pledged to insulate him from any adverse consequences as a result of the reorganization. This argument does not hold water because if indeed any such assurances were given, Mr. Carroll was put on notice that they were no longer effective when he received the letter of June 19, 1998 which informed him that his position was eliminated. Therefore, any assurances extended were rendered ineffective by the subsequent letter.

Complainant's reliance on the fact that Mr. Carroll was given the opportunity to secure another position is similarly misplaced. The fact that Mr. Carroll was given the opportunity to find another position is quite similar to factual scenario presented in **English**. The employee was also

given time to find another position in that case, but it was held that the statute began to run when the challenged employment decision, namely, elimination of her prior position, was communicated. In this instance, the challenged employment decision was made on June 19, 1998 which commenced the running of the statue. From that date on, it was clear that Mr. Carroll would not be able to return to his former position as Manager of Energy Operations. Even if he was unable to find a suitable alternate position, it would not have effected the prior challenged employment decision.

I find that the facts in this case are distinguishable from the facts in **Whitaker** and **Ross**. In **Whitaker**, the ARB determined summary decision was not appropriate because the employee received repeated assurances that he would receive a comparable position, had interviewed and was told that it went well and was never told that the two positions he was offered were final offers. That situation is in sharp contrast to the case at hand because Mr. Carroll was informed unequivocally that his position was eliminated and did not receive any assurances from Company officials after the June 19, 1998 letter that he would be placed in a comparable position. It is true that he was still afforded the opportunity to obtain another position with the Respondent. However, the employee in **English** was afforded the same opportunity and that did not prevent the running of the statute. **Ross** is also distinguishable because in that instance the employee was given the chance to regain his former position. The employee was told that he had to find another position with the company within 45 days or receive medical clearance so that he could regain access to secured areas and thus his position. It was never intimated to Mr. Carroll that he had a chance to regain his old position after the letter of June 19, 1998. It seems that this fact was apparent to Mr Carroll and his then counsel because in the demand letter drafted by Attorney Litwin on November 3, 1998 did not indicate that restoration of his position, or any other employment with the Company for that matter, was part of the relief being sought.

Complainant's contention that the award of a salary increase indicates that the notice of termination was equivocal does not carry any weight. The correspondence clearly shows that the salary increase was applied retroactively while he was out on temporary disability. The fact that the Company awarded Mr. Carroll a salary increase to which he was entitled has no bearing on the fact that his position was eliminated and he was given final and unequivocal notice of this action.

The contention that the notice of termination was withdrawn on two occasions is more troubling. However, based on the Supreme Court's holding in **Delaware State College v. Ricks**, I find and conclude that it is insufficient to render the June 19, 1998 termination anything less than final and unequivocal. Complainant avers that the two occasions on which the Respondent withdrew the termination notice was the letter dated September 1, 1998 in which counsel for the Respondent requested a meeting to discuss, among other things, Mr. Carroll's "future employment status at the Company." The second occasion was the letter dated October 19, 1998 in which Mr. Carroll was informed that his employment would not be terminated, but that he would be placed on unpaid status pending further settlement discussions.

In **Delaware State College**, the plaintiff was a college professor who was denied tenure on March 13, 1974. The plaintiff then filed a grievance in May of 1974. In keeping with common

practice, the plaintiff was offered a one year terminal contract on June 26, 1974 which was to expire June 30, 1975. In the letter sent to plaintiff containing the contract offer it was also stated that there was no way of knowing the outcome of the grievance procedure and if the grievance committee were to offer the plaintiff tenure it would supersede any action relating to the one-year terminal contract. The plaintiff signed the contract on September 4, 1974 and his grievance was then denied on September 12, 1974. Ricks filed a claim after the expiration of his terminal contract which was dismissed as untimely as it was not filed within 180 days of the June 26, 1974 decision to deny tenure. The Third Circuit reversed. The Supreme Court sided with the District Court decision and dismissed the case. "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." **Delaware State College** at 257, 504. The Court rejected the argument that the applicable date should be September 12, 1974, when the outcome of the grievance procedure was made known to the plaintiff. "The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made." **Id.** at 261, 506. Moreover, "we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." **Id.**

The circumstances of Mr. Carroll's case closely resemble those in **Delaware State College**. The decision to eliminate the position of Manager of Energy Operations was final and unequivocally expressed to Mr. Carroll on June 19, 1998. There was no subsequent expression by the Respondent that that decision would be reconsidered. The letters of September 1, 1998 and October 19, 1998 merely mention the Complainant's "employment status" and do not mention any possibility of reconsidering the decision to eliminate Mr. Carroll's position. In that sense, the negotiation process between Respondent and Mr. Carroll is analogous to the grievance procedure in **Delaware State College**.

The second prong of Complainant's argument that Respondent attempted to gag Mr. Carroll is specious. Complainant argues that there were two distinct ways in which Respondent attempted to gag Mr. Carroll, namely, conditioning receipt of a severance package on the execution of a general release and threatening to sue Mr. Carroll if he did not return certain documents. With regards to the execution of the release, Complainant wrote "Mr. Carroll's receipt of a severance package would be conditioned on his execution of a general release containing a gag provision that would have prevented Mr. Carroll from voluntarily approaching Unitil's regulatory agencies and disclosing its illegal activities." This statement is simply incorrect. As summarized above, the release specifically granted an exception for disclosure "**as required by governmental or regulatory agencies**." Therefore, Complainant's reliance on **Connecticut Light & Power** is misplaced. In that case, the terms of the settlement agreement prohibited the employee from appearing or encouraging others to appear at any judicial or administrative proceeding against employer, required the employee to resist compulsory process and curtailed the substance and manner in which the employee could communicate with the NRC. The release proffered by Respondent bears no resemblance in any manner, shape or form to the above release. It is merely requires confidentiality regarding the terms of the settlement, a very common provision, except as required by governmental or regulatory agencies. Accordingly, conditioning receipt of the severance package on the execution of the release

was not an attempt to gag Mr. Carroll.

According to Complainant, Respondent also attempted to gag Mr. Carroll by threatening legal action if he did not return certain company documents. As Respondent pointed out in their reply brief, disclosure of privileged documents does not constitute protected activity. **Douglas v. DynMcDermott Petroleum Operations Co.**, 144 F. 3d 364 (5th Cir. 1998); **Laughlin v. Metropolitan Washington Airports Authority**, 149 F. 3d 253 (4th Cir. 1998). Therefore, threatening legal action to secure the return of privileged documents does not constitute an attempt to gag. Complainant seems to anticipate this because in its Sur-Reply Brief it seeks to show that the documents were no longer privileged based on the Respondent's irresponsible handling of the documents. Mr. Carroll submitted a second declaration which accompanies the Sur-Reply Brief which explains how he came into possession of the documents in question. The declaration does not show that the documents were handled in such a manner that would cause then to lose protection under the attorney/client privilege. Mr. Carroll was still an employee of the Respondent when he came into possession of the documents. The documents were never released to any outside parties. Therefore, the Respondent's threat to sue was a legitimate action and did not constitute an attempt to gag the Complainant.

## CONCLUSION

Respondent gave Mr. Carroll final and unequivocal notice of the elimination of his position on June 19, 1998. Mr. Carroll failed to file a complaint within thirty days of that date as required by the relevant statutes. There was no attempt to gag Mr. Carroll which could have extended the statute of limitations. Accordingly, the complaint was filed in an untimely matter and the Motion for Summary Decision is hereby **GRANTED**.

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**DAVID W. DI NARDI**
Administrative Law Judge

Boston, Massachusetts
DWD:jd

**NOTICE**: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. ***See*** 29 C.F.R. §§§§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).